Cartel Sentencing in Ireland: Criminal Standards of Proof, But Civil Sanctions

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By

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Abstract

On 20 June 2018 the Court of Appeal in Ireland's first bid-rigging case determined that the €7,500 fine imposed by the lower court on a corporate officer was unduly lenient. It was increased to €45,000. The €10,000 fine on the undertaking was not varied. The effect of the Court's judgment, if followed in future cartel cases, is that for cartels in Ireland the criminal standard of proof remains, but the only sanction is a fine, what in many EU jurisdictions is regarded as a civil sanction. No gaol sentence was imposed and no justification provided. This is likely to undermine the effectiveness of the Cartel Immunity Programme, a vital tool for cartel detection and prosecution. Fines based on the cartel induced price rise are not only seriously underestimated by the Court, by a factor of around five, but imposed on the wrong target (i.e. the corporate officer not the undertaking). Ignorance as a defence has been revived. Victims are blamed. Bid-rigging cartels appear – unjustifiably - to be of lesser importance than other types of hard core cartels. Major arguments made by the Director of Public Prosecutions in the appeal were simply ignored by the Court with no explanation offered. The prospect for competition law enforcement in Ireland is grim, particularly with respect to bid-rigging cartels which the Competition and Consumer Protection Commission has made an enforcement priority.

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I Introduction

Cartel enforcement in Ireland has suffered a major setback with the 20 June 2018 Court of Appeal (the Court) judgment in the commercial flooring bid-rigging case.[1] The judgment affirms that in order to secure a conviction for a hard core cartel requires the criminal standard of proof, beyond a reasonable doubt.[2] However, the only sanctions imposed by the Court on conviction were fines, what would be considered a civil sanction in many competition regimes in the European Union and elsewhere, with a lower burden of proof, on the balance of probabilities.[3]

Although Ireland's competition legislation contains provisions for gaol sentences of up ten years for hard core cartels,[4] the Court decided in commercial flooring bid-rigging cartel not to impose a gaol sentence whether suspended or custodial. The Court does not discuss the merits or even mention, except in passing, the possibility of a gaol sentence in its judgment.[5] Such an omission – if precedent setting - signals that gaol is a dead letter, an irrelevance, in sentencing in bid-rigging and perhaps other hard core cartel competition cases in Ireland.

The Court's decision, however, hampers cartel enforcement in Ireland in other important ways. The Cartel Immunity Programme, a vitally important tool for cartel detection and prosecution, is severely undermined. The Court did not challenge the lower court's view that bid-rigging in this case "*didn't involve a cartel*." Victims – often multinationals – are blamed. Ignorance as a defense which had been removed from competition law in 2002 is restored.

The fines imposed by the Court hit the wrong target. A corporate officer, *not* the undertaking involved in the bid rigging, is required by the Court to pay a fine that "*should be greater than the financial gain so that it satisfies the requirement that it is punitive and acts as a deterrent.*" The methodology used to derive the fine is, in any event, flawed. The fine should be further increased by a factor of approximately 5.4, from €45,000 to €245,000.

Section II provides the background including the sentencing of Aston Carpets and Brendan Smith in the Central Criminal Court (CCC). The Court judgment is described in section III, while section IV provides a commentary on the Court's judgment. Some implications of this judgment are explored in section V, including suggestions as to how the adverse effects for cartel enforcement of the judgment of the Court might be ameliorated.

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[1] *Director of Public Prosecutions v Aston Carpets and Flooring and Brendan Smith* [2018] IECA 194. See: http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/2cb5947905448052802582c0005552e4?OpenDocument. The judgment will be referred to as *DPP v Aston Carpets*.

[2] The charges under the Competition Act 2002 as amended are set out in *DPP v Aston Carpets*, para. 1. The issue of hard core cartels under Ireland's competition law is discussed in Andrews, Gorecki & McFadden (2015, pp. 89-92).

[3] It is the case that the Court also affirmed the suspended gaol sentence, but this was for obstruction of justice and not for infringing competition law. See *DPP v Aston Carpets*, para. 23. In this paper attention is confined almost exclusively on the treatment by the courts of competition law infringements.

[4] The maximum gaol sentence was increased from five to ten years under the Competition (Amendment) Act 2012.

[5] *DPP v Aston Carpets*, para. 18.

II Background[6]

a. The Bid-rigging Arrangements

The commercial flooring bid-rigging cartel was operated by two of the leading commercial flooring contractors in Ireland: Aston Carpets and Flooring Limited (Aston Carpets) and Carpet Centre (Contracts) Limited (Carpet Centre). Brendan Smith participated on behalf of Aston Carpets, David Radburn for Carpet Centre.

Commercial flooring contractors supply and install carpets and other flooring products. The bid-rigging cartel arrangements were confined to larger contracts, often involving multinational customers such as Google, PayPal and Mastercard. Typically it appears that these contracts were awarded on the basis of competitive tendering.

The bid-rigging cartel arrangements operated from 1 January 2011 to 30 April 2013. Brendan Smith initiated the bid-rigging arrangements on the former date when he contacted David Radburn, while on the latter date the Competition and Consumer Protection Commission (CCPC) searched the premises of Aston Carpets, Carpet Centre and two other sites.

The bid-rigging cartel arrangements operated through a system of cover bidding.[7] Brendan Smith and David Radburn would decide who would submit the competitive lower-priced bid and who would submit the non-competitive higher priced bid. Such cover bidding occurred on sixteen occasions, with in all but two cases either Aston Carpets or Carpet Centre being awarded the contract. The contracts varied in value from €17,000 to €477,000.

b. Investigation

The CCPC investigation was initiated by information received early in 2012, which included an email between Brendan Smith and David Radburn concerning a specific instance of alleged bid rigging. CCPC searches followed in April 2013. David Radburn and Carpet Centre subsequently applied for immunity from prosecution under the Cartel Immunity Programme, operated jointly by the CCPC and the Director of Public Prosecutions (DPP). The CCPC submitted a file to the DPP in 2014. There were 200 separate investigative actions by the CCPC with 41 witnesses lined up should they be necessary.[8]

c. Prosecution

The DPP, an independent office with the Director appointed for life, has sole responsibility in Ireland for bringing criminal prosecutions by way of indictment. In 2015 the DPP decided to bring charges against Aston Carpets and Brendan Smith for breaching competition law and against Brendan Smith for

[6] For further details on the background to the case see Gorecki (2017a, 2017b, 2017c).
[7] For a discussion of bid-rigging see OECD (2009).
[8] These numbers were included in the testimony of the Chairperson of the CCPC before the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach Debate, 20 June 2017. See: http://beta.oireachtas.ie/ga/debates/debate/joint_committee_on_finance_public_expenditure_and_reform_and_taoiseach/2017-06-20/3/.

impeding a criminal prosecution.[9] Both Aston Carpets and Brendan Smith pleaded guilty to breaching section 4(1)(a) of the Competition Act 2002. This section refers to agreements between undertakings which have as their "*object or effect the prevention, restriction or distortion of competition … [in that they] indirectly fix purchase or selling prices*." On 31 May 2017 in the Central Criminal Court (CCC) Brendan Smith was fined €7,500 and Aston Carpets was €10,000 for the competition offences, while Brendan Smith for the perversion of the course of justice was given a three month goal sentence, suspended for two years.

d. Sentencing in the Central Criminal Court

The CCC in sentencing Brendan Smith and Aston Carpets on 31 May 2017 relied heavily on the 2009 *Duffy* judgment in the Citroen Dealers Association (CDA) cartel – the leading case in cartel sentencing in Ireland.[10] Indeed, both prosecution and defence argued that this judgment should guide the CCC in sentencing. The approach adopted by the CCC was to compare the CDA cartel with the commercial flooring bid-rigging arrangements. The CCC concluded that since the CDA cartel was "*exponentially more serious*"[11] than the commercial flooring bid-rigging arrangements much lower sanctions were appropriate.

In reaching this conclusion the CCC used four criteria: duration (5 years for the CDA in *Duffy* compared to 2 years and 4 months in commercial flooring bid-rigging); geographic scope (national as compared to regional); victims characteristics (final consumers as compared to large multinational firms that were in a position to exercise independent commercial judgment); and, organizational complexity/effectiveness (agreement on extensive array of prices and employment of mystery shopper to detect cheating as compared to occasional phone calls/meetings). The CCC went so far, based on this comparison, as to conclude that the bid-rigging arrangements in commercial flooring "*didn't involve a cartel.*"[12]

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[9] The offence of impeding a criminal prosecution was brought under section 7(2), Criminal Law Act 2007 and not as stated in Gorecki (2017a, Table 1, p. 8; 2017c, Table 1, p. 569) under common law.

[10] *DPP v Duffy & Anor* [2009] IEHC 208. This will be referred to as the *Duffy* judgment. It should be noted that this is the only judgment on sentencing in a cartel case that is in the public domain. However, the sentencing of Pat Hegarty on 3 May 2012 in the home heating cartel in the Circuit Criminal Court (https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/02/DPPvPatHegartyJudgement_0.pdf) and of Brendan Smith and Aston Carpets on 31 May 2017 in the commercial flooring bid-rigging case in the CCC (Gorecki, 2017a, Annex A, pp. 44-56) are also publicly available.

[11] *DPP v Aston Carpets*, S, p.8. S refers to the transcripts of the CCC's sentencing on 31 May 2017.

[12] *DPP v Aston Carpets*, S, p.5. Apart from the first criterion, the CCC's interpretation can be seriously questioned, *inter alia,* as to: (i) factual accuracy (e.g. while it is correct that the CDA was an Ireland-wide organization, the *Duffy* case was solely confined to Leinster in the indictment and the evidence. In contrast, the indictment in the commercial flooring bid-rigging case against Aston Carpets and Brendan Smith referred to Ireland, although the evidence suggested that the in fact the arrangements were confined to the Dublin region. In other words, there is little to divide the two cartels in terms of geographic scope) and, (ii) the finding that commercial flooring bid-rigging arrangements didn't involve a cartel when in fact it exhibited all of the characteristics of a hard core cartel (see Box 1 below). These arguments need not be rehearsed here, but can be found in Gorecki (2017a, 2017b, 2017c) while in some instances they are also discussed in section IV below.

e. DPP Appeal on Grounds of 'Undue Leniency'

The DPP, under section 2(1) of the Criminal Justice Act 1993 appealed to the Court of Appeal the CCC sentences imposed on Aston Carpets and Brendan Smith on the grounds of "*undue leniency*." The Court under section 2(3) of the Criminal Justice Act 1993, may "*either: (a) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or (b) refuse the application*." In the instant case the Court refused the application with the exception of the CCC fine imposed on Brendan Smith. Here the Court determined that €7,500 was unduly lenient and raised the fine to €45,000. There is no indication that the Court's judgment will be appealed to the Supreme Court.

III Court of Appeal Judgment

a. Introduction

The Court of Appeal judgment in the *DPP v Aston Carpets* is short. It is only twenty four paragraphs. Some of these are no more than a sentence. After briefly outlining the charges, the sanctions imposed by the CCC on Aston Carpets and Brendan Smith together with some background facts, the judgment recites the grounds of appeal by the DPP that the CCC was unduly lenient and the mitigating submissions made by Aston Carpets and Brendan Smith. The Court presents a discussion involving some of the sentencing remarks in the *Duffy* judgment and makes some observations concerning the commercial flooring bid-rigging case. The final five paragraphs of the Court of Appeal judgment sets out its decision.

b. DPP's Grounds for Undue Leniency

The DPP relied upon six grounds in arguing that the CCC had been unduly lenient in sentencing Aston Carpets and Brendan Smith:

> *(i) the learned sentencing judge erred in principle by in effect applying DPP v. Duffy [2009] IEHC 208 as a sentencing guideline. The maximum penalty enacted by the Oireachtas for the Competition Act offenses is a prison sentence of ten years and / or a fine of €5m. By applying the Duffy decision in the manner in which he did the learned sentencing judge dramatically reduced the spectrum of potential penalties open to him;*
>
> *(ii) the learned sentencing judge erred in principle in failing to attach any significance to the significant aggravating fact that the victims of this cartel were in the main large companies expanding, or opening new premises in this jurisdiction at a time of deep recession;*
>
> *(iii) the learned sentencing judge erred in principle in observing that the respondent and Mr. Radburn (or by extension Carpet Centre (Contracts) Limited) were not a cartel in circumstances where the evidence established the existence of a cartel and same formed the basis of the offence to which the respondents had pleaded guilty;*
>
> *(iv) the learned sentencing judge erred in drawing a significant distinction between an anti competitive scheme as perpetrated on consumers as oppose to other commercial entities. In doing so the learned sentencing judge failed to give any weight to the fact that anti competitive agreements are clandestine in nature. Moreover there was no evidence before the learned sentencing judge to the effect that the victims of the crime, whether consumers or commercial entities, might have been able to detect the unlawful conduct by way of exercising some element of independent judgment.*
>
> *(v) the learned sentencing judge erred in principle by imposing penalties which failed to adequately reflect the principle of specific deterrence. In particular the fines bore no rational relationship to the improperly earned profits earned as a result of the anti competitive conduct;*

(vi) the learned sentencing judge erred in principle by imposing penalties which failed to adequately reflect the principal of general deterrence …[13]

There was a seventh ground relating to Brendan Smith concerning the obstruction of justice. However, the focus of this paper is on the competition law breaches and hence we do not consider this ground.

c. Pleas in Mitigation

Aston Carpets (the first respondent) and Brendan Smith (the second respondent) filed separate pleas in mitigation. As the Court of Appeal noted "*there has been no relationship between the respondents since 2014.*"[14] Aston Carpets filed six grounds which had also been contained in submissions to the CCC:

(i) the plea of guilty well in advance of a likely trial date;

(ii) the person who was actually responsible on a practical level for the criminal conduct was the second respondent, and no other officer of the first respondent was prosecuted;

(iii) the first respondent was sold by the second respondent to Queen Mosaics for €2.5m, and Queen Mosaics were required to borrow in order to affect the purchase;

(iv) the first respondent did not prosper commercially after 2008 because of the recession;

(v) the first respondent was co-operative and did not seek to wind its operations down in the face of the charges preferred against it, and

(vi) the first respondent engaged in legal representation at considerable cost.[15]

Brendan Smith relied on five grounds in mitigation:

(i) an early plea of guilty;

(ii) the provision of some limited assistance;

(iii) the lack of personal financial benefit to himself and the overall relatively small additional profit to the company earned as a result of the criminal activity;

(iv) his personal difficulties including a history of alcohol and cocaine addiction, self harm and suicidal ideation, and

(v) no previous convictions.[16]

These had also been filed at the CCC.

[13] *DPP v Aston Carpets*, para. 7.
[14] *DPP v Aston Carpets,* para. 8.
[15] *DPP v Aston Carpets*, para. 9.
[16] *DPP v Aston Carpets*, para. 10.

d. Discussion[17]

The Court of Appeal while noting that the DPP argues that the CCC incorrectly applied the *Duffy* judgment to the instance case quotes the CCC's conclusion that the latter case was "*exponentially more serious*" than the commercial flooring bid-rigging case and imposed sentences accordingly.[18] The Court then quotes passages from the *Duffy* judgment concerning aggravating and mitigating factors[19] and how cartels should be viewed "*as a property crime, like burglary or larceny.*"[20] The Court accepts the conclusion of the CCC that the cartel induced profits made in the commercial flooring bid-rigging arrangements were "*modest*" and that those affected were large corporations rather than final consumers as in the CDA cartel.[21] The maximum penalties under competition law are recited[22] and the well settled principles that govern undue leniency set out.[23]

e. Decision[24]

The Court of Appeal dismisses the DPPs first ground of appeal stating that the CCC in sentencing Aston Carpets and Brendan Smith "*expressly did so in the context of the increased penalties having been introduced and doing so in those circumstances did not constitute an error of principle.*"[25] The Court then turns to consider the culpability of Aston Carpets and Brendan Smith in breaking competition law. The Court states that at the time of the offences Aston Carpets "*was, for all practical purposes, a company very much controlled by*"[26] Brendan Smith. Although the Court considers that Brendan Smith only gained indirectly from the commercial flooring bid-rigging arrangements, nevertheless Aston Carpets "*faces the considerable liability of having to pay a substantial fine [€10,000] in circumstances where its current owners and shareholders were in no way responsible for the criminal conduct in*

[17] *DPP v Aston Carpets*, paras. 11-19.
[18] *DPP v Aston Carpets*, para. 11.
[19] *DPP v Aston Carpets*, para. 14.
[20] *DPP v Aston Carpets*, para. 15. In this case the *Duffy* judgment was citing a passage in a paper by Greg Werden of the US Department of Justice presented at a conference organized by the CCPC in November 2008. Werden's paper was subsequently published in 2009.
[21] *DPP v Aston Carpets*, para. 17.
[22] *DPP v Aston Carpets*, para. 18.
[23] *DPP v Aston Carpets*, para. 19. The Court cites the following passage from *DPP v McCormack* [2000] 4I.R., *"Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon those two factors. It is only when the penalty is below the range so determined on this basis that the question of undue leniency may be considered."*
[24] *DPP v Aston Carpets*, paras. 20-24.
[25] *DPP v Aston Carpets*, para. 20.
[26] *DPP v Aston Carpets*, para. 21. Aston Carpets was established by Brendan Smith in 2003. It was sold to Crean Mosaics Unlimited Company (Crean Mosaics) in 2007. The board of Aston Carpets included not only Brendan Smith but also the Executive Chairman and Managing Director of Crean Mosaics (Crean Mosaics, 2011). For further discussion see section IV(d) below.

question."[27] The Court is satisfied that the "*substantial fine*" imposed on Aston Carpets is "*appropriate and within the discretion available to the learned sentencing judge*."[28]

The Court considered the fine of €7,500 imposed on Brendan Smith, however, was unduly lenient.[29] The only factors cited by the Court in coming to this conclusion was that Brendan Smith "*was the person for overall responsibility for the events that occurred in that he effectively orchestrated them and indirectly stood to benefit from them*."[30] In deciding the appropriate fine the Court stated that, "*save in exceptional circumstances, a fine should be for a sum greater than the financial gain so that it satisfies the requirement that it is punitive and acts as a deterrent*." The Court determined that the "*financial gain … from the activity in question … was in the region of €31,000.*"[31] Given these facts and considerations, the Court increased the fine on Brendan Smith from €7,500 to €45,000 or 1.45 times the financial gain from the cartel.

The Court did not address the issue of whether or not the absence of a gaol sentence, whether custodial or suspended, for Brendan Smith for infringing competition law constituted undue leniency.[32]

[27] *DPP v Aston Carpets*, para. 21.
[28] *DPP v Aston Carpets*, para. 22.
[29] *DPP v Aston Carpets*, para. 23.
[30] *DPP v Aston Carpets*, para. 23.
[31] *DPP v Aston Carpets*, para. 23.
[32] The Court did affirm that the suspended gaol sentence for obstruction of justice did not constitute undue leniency. *DPP v Aston Carpets*, para. 23.

IV Comment

a. Introduction: Accessing the Raw Material

In commenting and analyzing the approach taken by the courts in the instant (or indeed any) case it is useful to have the background facts, the arguments, the legal and other submissions and the transcripts. The availability of such material enables a fuller understanding and appreciation of the case and the judgment. It is recognized that administrative and other costs, plus concerns over privacy in some situations, may limit the public availability of such material.

Ideally, of course, the judgment should set out the arguments of the prosecution and defence, together with the court's reasoning on the key issues before the court, thus largely obviating the need for such material. Judgments by the European Court of Justice on competition issues are typically structured in this way. Such an approach shows that the court has carefully considered the key arguments thus lessening the possibility of being accused of having made ill considered findings. However, the Court's judgment did not follow this approach. Important issues are ignored and arguments not set out. Hence it is important to obtain access to legal submissions etc.

The Court refused access to the submissions and stated that "*transcripts of appeal hearings are not ordinarily typed even at the request of the parties.*"[33] Many of the cases of that the Court of Appeal hears would formerly have gone to the Supreme Court. On 7 October 2013 the Supreme Court issued a Practice Direction, SC15, 'Written Submissions,' which outlined procedures by which a person might be able to access written submissions in cases before the Supreme Court.[34] The Court of Appeal has not followed this precedent.

In contrast, the CCC released to the author the transcripts of the sentencing hearing (SH) held on 4 May 2017 at which the facts of the case were set out, arguments in mitigating put forward and the DPP's comments concerning sentencing made, and the transcripts of CCC's sentencing (S) on 31 May 2017. Hence given the lack of access to Court of Appeal documentation, it is these two CCC sources, in particular, that we rely on for background to the case for the purposes of analysis.

b. A Question of Methodology: Determining What is a Cartel

Ireland's Competition Act 2002 as amended, like its EU counterpart, prohibits agreements which have as their object or effect the prevention, restriction or distortion of competition. Indeed, the preamble to the legislation makes explicit reference "*by analogy*" to what is now Article 101. Again like its EU counterpart, certain examples of agreements which prevent, restrict or distort competition are enumerated. These include those which "*directly or indirectly fix purchase or selling prices or any other*

[33] Email from Court of Appeal dated 6 November 2018. The DPP refused to release a copy of their submission on the grounds "*it is long standing practice the submissions cannot be released to a party not directly involved in the proceedings*" (Email dated 26 June 2018).

[34] http://www.courts.ie/Courts.ie/Library3.nsf/16c93c36d3635d5180256e3f003a4580/07951e8087c6b9ff802581210053330e?OpenDocument. The author successfully used these procedures to obtain submissions in a competition related case before the Supreme Court.

trading conditions" as well as those which "*share markets or sources of supply*."[35] The Competition Act 2002 as amended also contains certain rebuttable presumptions. In particular, it is presumed under section 6 that an agreement between "*competing undertakings*" to "*directly or indirectly fix the prices*" or to "*share markets or customers*" has as its "*object the prevention, restriction or distortion of competition*." These are essentially what are regarded as hard core cartels.

There is no *a priori* or empirical support for the ranking of a price fixing cartel as opposed to a bid-rigging cartel in terms of their ability to raise price and thus damage consumer welfare.[36] The effectiveness of a particular cartel arrangement or agreement amongst competing undertakings will be a function not only of the market characteristics of the good or service subject to the agreement,[37] but also the characteristics of the cartel itself.[38] If in comparing the effectiveness of two cartels cognizance is not taken of these differences then the results of any comparison should be discounted.

Notwithstanding these considerations, the CCC concluded that the commercial flooring bid-rigging cartel "*didn't involve a cartel*" based on a comparison with the CDA cartel, without paying any attention to the differences in market and cartel characteristics. However, once these characteristics are taken into account there is little to choose between the effectiveness of the two cartels in raising price (Box 1). Indeed, it could be argued that the commercial flooring bid-rigging cartel was more effective.

It is thus not surprising that one of the grounds that the DPP argued that the CCC sentencing was unduly lenient was the fact that the CCC stated that commercial flooring bid-rigging cartel was "*not a cartel in circumstances where the evidence established the existence of a cartel*."[39] A corollary of the CCC's position is that the sentence imposed by the CCC would accordingly be lower, other things being equal.

The Court decided, however, neither to discuss nor address this particular DPP ground for appeal. If left to stand then it is likely that in future cartel cases the CDA cartel will be the benchmark. Even if a bid-rigging (or other hard core) cartel is highly effective at raising price and thus damaging consumer welfare, if this approach is followed then unless the cartel matches the way the CDA cartel operated it will not be considered a cartel and will as a result have a corresponding lesser sanction. It is not at all clear that such an approach to characterizing cartels is appropriate or useful from a competition law enforcement perspective.

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[35] Section 4(1)(a) and 4(1)(c), Competition Act 2002, respectively.

[36] See, for example, the discussion by the United States Sentencing Commission (2011, pp.311-314) of the guidelines concerning cartels. Case studies of bid-rigging cartels demonstrate that they can raise prices above the competitive solution on a sustainable basis. See, for example, Froeb *et al* (1993). Surveys of a large number of price fixing and bid-rigging cartels across a large number of jurisdictions and time periods find that while both raise prices, there is no consistent pattern of one type of cartel being more successful than the other. For details see Connor (2014, Table 5, p. 289). Although Connor (2014, p. 295) reports that the overcharge is lower for bid-rigging cartels (compared to price fixing) he nevertheless cautions that the "*apparent lower overcharges arising from bid rigging may be an illusion*."

[37] For example, the height of barriers to entry, whether the product is homogeneous or differentiated, the growth in market demand, whether the buyers have countervailing buyer power and so on.

[38] For example, the number of cartel members, the market shares and symmetry of the cartel members, the degree of spare capacity, and so on.

[39] *DPP v Aston Carpets*, para. 7(iii).

Box 1: A Comparison of Two Cartels: the CDA and Commercial Flooring

The CCC argued that the cartel in the *Duffy* case was much more highly organized than the commercial floor bid-rigging cartel arrangements. The CCC quoted the *Duffy* judgment as to the comprehensiveness of the CDA arrangements with respect to the various prices that were agreed and the methods used by the CDA including the use of mystery shoppers to detect possible cheating on the prices agreed. The bid-rigging cartel arrangements in commercial flooring were nowhere near as comprehensive nor did they have mystery shoppers to detect cheating. Indeed, the CCC stated that the commercial flooring bid-rigging arrangements "*didn't involve a cartel*."

There can be little doubt that the CDA contained all the hallmarks of a classic cartel in terms of its organizational complexity. By comparison the commercial flooring bid-rigging arrangements seem at first sight somewhat amateurish. However, this comparison in terms of the effectiveness of the latter cartel's ability to raise price is not only deceptive but incorrect for a number of reasons.

In making comparisons in terms of organizational complexity/effectiveness across two cartels like must be compared with like in terms of: the number of cartel members; the schedule of prices to be agreed; the incentive to cheat on any cartel agreement and the ease of detection; and so on. If there are substantial differences in the nature of the two cartels then that must be taken into account in comparing the organizational complexity/effectiveness. The CCC failed to do in the evaluating the commercial flooring bid-rigging cartel.

Consider the following reasons why the commercial flooring cartel did not need the same degree of complexity as the CDA cartel but at the same time could operate as an effective cartel: (i) there were only two participants in the commercial bid-rigging arrangements, but seven for CDA in the Leinster region. (ii) There was no necessity for a complex agreed price list as occurred in the *Duffy* case. Brendan Smith (or David Radburn) had the bid of David Radburn (or Brendan Smith) for a particular commercial flooring contract and was only required to bid a higher price. (iii) Detection of breaches of the commercial flooring bid-rigging cartel was easy and did not require the hiring of a mystery shopper to determine if the Brendan Smith (or David Radburn) had cheated. The winner of a commercial flooring contract, irrespective of whether or not bid-rigging had taken place, quickly becomes apparent. (iv) Given the frequency with which Brendan Smith and David Radburn agreed on bid-rigging – on average once every 7 weeks over the period of the bid-rigging arrangements – there is little incentive to deviate from the agreed cover bid in order to gain a competitive advantage. (v) The punishment mechanism for any deviation by either Brendan Smith or David Radburn, albeit implicit, is a return to competition and the loss of the gains from the bid-rigging cartel arrangements. Given the nature of the market it could be argued that the non-collusive solution would be Bertrand, resulting in prices equal to marginal cost, the perfectly competitive result (Martin (2010, pp. 77-78)). (vi) Bid-rigging cartels such as that operated in commercial flooring are easier to sustain and hence not only arguably more effective but are also more difficult to detect and prosecute as compared to the CDA.

Trust is required between only two individual as compared to a much greater number in the CDA cartel. In the commercial flooring bid-rigging cartel there is less paperwork and other documentation in operating the cartel. The occasional meeting or phone call is enough to fix a bid; in contrast more complex arrangements are required for the CDA leading to a greater likelihood of detection. It also means that the costs of operating the CDA cartel are greater, other things being equal, than the commercial flooring bid-rigging cartel.

In sum, notwithstanding the greater organization complexity of the CDA, the commercial flooring bid-rigging cartel is not only likely to be more effective in restricting competition but also more difficult to detect and prosecute. Indeed, the complexity of the CDA cartel is a reflection of the difficulty of organizing such a multi-member cartel.

Source: Gorecki (2018a, p. 21, pp. 25-26), footnotes omitted.

c. Blaming the Victim

The object of competition policy in Ireland, as in the EU, is to promote consumer welfare.[40] Cartels lower consumer welfare by raising price. This conclusion holds irrespective of whether or not the cartel sells directly or indirectly to final consumers. If there is a cartel induced price rise in an intermediate market, upstream from the final or end consumer, then that higher price will typically be reflected in increased downstream prices to consumers. There is, however, no necessity to demonstrate that a cartel induced price rise in an intermediate market feeds through to a given increase in consumer prices.

Whish & Bailey (2012, pp. 19-20) comment, for example,

> *This does not mean that EU competition law is applicable only where a specific increase in prices to end consumers can be demonstrated. EU law has recognized from the early days that consumers can be indirectly harmed by action that harms the competitive structure of the market, and it continues to do so today; there is no inconsistency between these statements and the proposition that EU competition law is oriented around the promotion of consumer welfare.*[41]

This is consistent with section 4(1)(a), Competition Act 2002 that prohibits agreements "*that directly or indirectly fix purchase or selling price*."[42]

If a cartel operates in an intermediate market then the initial victim of the cartel induced higher price is a business, although the ultimate victim is, of course, the consumer.[43] Since cartels typically operate in secret it is unlikely that either consumers or producers will be able to readily detect the existence of a cartel. If, for example, businesses purchase the cartelized product or service infrequently and it constitutes only a small percentage of a larger package/contract then it is not at all obvious that it would be aware of paying (say) 10 or 15 per cent above the non-collusive price. This inference is strengthened

[40] This has been set out explicitly by the Supreme Court in *Competition Authority v O'Regan & Ors* [2007] IESC 22, which states at para. 106,

> *The entire aim and object of competition law is consumer welfare. Competitive markets must serve the consumer. That is their sole purpose. Competition law, as is often said, is about protecting competition, not competitors, even if it is competitors who most frequently invoke it. Its guiding principle is that open and fair competition between producers of goods and services will favour the most efficient producers, who will thereby be encouraged to satisfy consumer demand for better quality products, wider choice and lower prices. Their reward is a greater market share. Production of better and newer products may necessitate expensive market research, involving a degree of economic resources and market power. Competition law does not outlaw economic power, only its abuse. Economic power may, indeed should, be the reward of effective satisfaction of consumer needs. It would be inconsistent with the objectives of free competition that successful competitors should be punished. It is not the existence but the abuse of a dominant position which offends principles of free and open competition.*

[41] Footnotes omitted from the citation.

[42] Similar wording is used in section 6(2)(a).

[43] For examples see McFadden (2013, pp. 52-64).

if the purchasers of the cartelized product or service are from quite disparate markets and hence rarely meet to exchange market information and gossip.[44]

In any event the difficulty of detecting cartels which are inherently secretive is evidenced by the existence of the Cartel Immunity Programme. Several of the leading cartels detected and prosecuted by the CCPC/DPP have involved an immunity applicant, demonstrating the difficulty of locating cartels.[45] Furthermore, immunity applicants are not confined to goods or services sold directly to final consumers, but also intermediate markets.

Notwithstanding these considerations, the CCC drew attention to the fact that the victims in the *Duffy* case were final consumers, while in commercial flooring the victims were businesses.[46] According to the CCC, these businesses in purchasing commercial flooring products and services "*were in a position to exercise a serious independent judgment as to whether or not they would contract with the offending parties*" and "*were capable of exercising such independent judgment because of their commercial capacity*." Hence businesses did not "*stand on the same footing as … consumers in terms of being victims of this type of crime on a practical basis*."[47]

It is thus not unexpected that one of the grounds that the DPP argued that the CCC sentencing was unduly lenient was the fact that the CCC in drawing the distinction between "*consumers as oppose to other commercial entities … [the CCC] failed to give any weight to the fact that anticompetitive agreements are clandestine in nature. Moreover there was no evidence before [the CCC] to the effect that the victims of the crime, whether consumers or commercial entities, might have been able to detect the unlawful conduct by way of exercising some element of independent judgment*." [48]

The Court, however, did not address this particular DPP ground for appeal. Instead, it obliquely referred to the issue:

> *Equally, it must be said that the customers affected, or potentially affected, by the unlawful cartel activity were relatively few in number and, in general, confined to large corporations or businesses, rather than, as was the case, in Duffy Motors, the larger number of individual car buying members of the public.*[49]

Thus no consideration is given to the fact that cartel induced price rises for intermediate goods and services are passed through to final consumers or to the fact that cartel offences are difficult to detect and hence it is unlikely that purchasers of commercial flooring services should be held liable for not detecting the cartel. Thus it appears that cartels in Ireland operating at one or more remove from the

[44] These conditions reflect those of the commercial flooring bid-rigging cartel.
[45] On heating oil see Gorecki & McFadden (2006, p. 637); on CDA Andrews, Gorecki & McFadden (2015, p. 160) & *Duffy* judgment, para. 10; and, the commercial flooring case. However, it should be noted the heating oil case was not started by the immunity witness who in any event died before the legal proceedings started.
[46] *DPP v Aston Carpets*, S, pp. 2-3.
[47] The Court also made a supplementary point that while the CDA cartel covered all purchasers of Citroen cars, the commercial flooring bid-rigging cartel did not cover all commercial flooring contracts.
[48] *DPP v Aston Carpets*, para. 7(iv).
[49] *DPP v Aston Carpets*, para. 17.

consumer (and hence selling to business customers) will be treated more leniently than cartels that sell directly to consumers.

d. The Revival of Ignorance as a Defence in Cartel Cases

Ignorance as a defence in competition cases has been revived by the Court of Appeal. If an undertaking involved in a cartel crime can successfully argue it was unaware of the activities of its corporate officers then it is absolved of responsibility.

Aston Carpets argued, *inter alia*, in mitigation to the Court of Appeal that: "*the person who was actually responsible on a practical level for the criminal conduct was … [Brendan Smith] and no other officer of … [Aston Carpets] was prosecuted*;" that Brendan Smith sold Aston Carpets for €2.5 million which was financed by borrowing; and, Aston Carpets did not prosper commercially after 2008 because of the recession.[50]

The Court of Appeal in its judgment stated that Aston Carpets "*was, for all practical purposes, a company very much controlled by … [Brendan Smith] at the time of the offences were committed*."[51] Brendan Smith "*was the person with overall responsibility for the events that occurred in that he effectively was the person with overall responsibility for the events that occurred in that he effectively orchestrated them.*"[52] The Court further opined that Aston Carpets was in a "*position … [where] it faces the considerable liability of having to pay a substantial, fine [€10,000] in circumstances where its current owners and shareholders were in no way responsible for the criminal conduct in question*."[53]

Ignorance as a defence in competition law in Ireland was abolished with the Competition Act 2002. Prior to that date, under section 2(2)(c)(i), Competition (Amendment) Act, 1996 "*it shall be a good defence to prove that … the defendant did not know … that the effect of the agreement … concerned would be the prevention, restriction or distortion of competition*." The Court's judgment appears to resurrect that canard.

No evidence was presented at the CCC[54] or in the Court's judgment to substantiate the assertion that the "*current owners and shareholders [of Aston Carpets] were in no way responsible for the criminal conduct in question."* It is not as though Brendan Smith was depicted as some kind of rogue employee by Aston Carpets.[55] Furthermore the Executive Chairman and Managing Director of Crean Mosaics, the parent company, were on the board of Aston Carpets, together with Brendan Smith.[56] Does the Court's judgment mean that in future a board member of a subsidiary company can simply absolve themselves of responsibility for the conduct of that subsidiary by claiming ignorance? What does it say about the role of the board? What does it say about the criminal liability of an undertaking?

[50] *DPP v Aston Carpets*, para. 9. It appears that the same arguments were made at the CCC.
[51] *DPP v Aston Carpets*, para. 21.
[52] *DPP v Aston Carpets*, para. 23.
[53] *DPP v Aston Carpets*, para. 21.
[54] Based on an examination of the CCC transcripts.
[55] At least judging by the CCC transcripts.
[56] For details see Gorecki (2017a).

e. Missing the Target: The Punishment Does Not Fit the Crime

The sentencing by the Court of Appeal hit the wrong target. Brendan Smith, rather than being sentenced to gaol, is fined based on the illicit financial gain of Aston Carpets.

In raising Brendan Smith's fine from €7,500 to €45,000 the Court of Appeal argued that the

> *… fine should more closely have reflected the actual financial gain accruing from the activity in question which was in the region of €31,000. The court is also of the view that, save in exceptional circumstances, a fine should be for a sum greater than the financial gain so that it satisfies the requirement that it is punitive and acts as a deterrent. The court will therefore impose a fine of €45,000 on [Brendan Smith].*[57]

We will return to the question of whether €31,000 was the cartel induced financial gain and whether the amount by which the fine should exceed the financial gain should be approximately 1.5 in the next section.

The main beneficiary of a cartel induced price increase is typically the business(es) involved and their shareholders through increased profits or lower losses. It is thus appropriate that any fine should be imposed on those businesses and that the fine should not only reflect the magnitude of the illicit monetary gain but also serve as a general deterrent to other potential cartelists. Such an approach creates the correct incentives since the business has a strong motivation to insure that it (including its representatives) is not breaching competition law by introducing, for example, appropriate compliance and other policies.[58] Furthermore the business is much more likely to be able to pay a fine based on these principles than a corporate officer.[59]

Counsel for Aston Carpets appears to accept these principles, at least insofar as corporate accountability is concerned, when they argued before the CCC that,

> *So, obviously the Court is aware that Ashton Carpet and Flooring pleaded guilty in advance and in advance of a trial and obviously the -- because Mr Smith was the moving person behind the -- behind the company at that stage, the company is liable, full stop, because he was an officer of the company and these acts were attributable to the company. No other officer of the company is prosecuted and that's a matter of some small importance.*[60]

However, the Court by imposing a fine on Brendan Smith reflecting the financial gain from the cartel departs from this principle.

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[57] *DPP v Aston Carpets*, para. 23.

[58] In the instance case this would have been, arguably, the responsibility of the board of the Crean Group of which Aston Carpets was part. For details see Crean Mosiacs (2011).

[59] Apart from the issue of ability to pay, the maximum statutory fines are lower for an individual than an undertaking. The maximum fines under the Competition Act 2002 as amended for Brendan Smith and Aston Carpets are set out in Gorecki (2017a, Table 3, p. 13).

[60] *DPP v Aston Carpets,* SH, pp. 42-43.

This is not to deny that corporate executives might also benefit from a cartel insofar as their remuneration is linked to the financial performance of the business. However, in the instant case the Court ruled Brendan Smith had "*no direct personal consequential gain*" due to the commercial flooring bid-rigging cartel, although there was "*clearly an indirect element of indirect gain for him in the sense he was in receipt of an income from the company and his personal prosperity benefited from the prosperity of the company*."[61]

Notwithstanding these considerations the Court expressed very strong views with respect to the culpability of Brendan Smith in the commission of a crime and felt that the CCC sanction was unduly lenient. This naturally raises the question of what for Brendan Smith would be the appropriate sanction. The obvious answer is a gaol term. The application of the US Sentencing Guidelines to the facts of the commercial flooring bid-rigging cartel would have resulted in Brendan Smith being sentenced to between 10-16 months gaol.[62] These guidelines take specific account of the fact that commercial flooring is a bid-rigging cartel and that Brendan Smith was an instigator of the cartel.

Gaol has several advantages, especially when compared to fines. It targets the individual concerned. A fine can always be paid for by the business for which the individual was employed.[63] The evidence suggests that gaol is an effective sanction for individuals in competition cases.[64] Furthermore after the *Duffy* judgment the expectation was that in the next cartel case individuals were put on notice that they could expect gaol.[65] In the CDA case every one of the eight individuals convicted was sentenced to gaol for breaching competition law – between three and nine months – albeit in all cases suspended not custodial. However, the Court in its judgment does not consider gaol at all.

This is an important omission. The imposition of a gaol sentence would not only have sent a strong signal to other would be cartelists of the consequences of such conduct but also established general deterrence at the key principle in sentencing in cartel cases. Such an approach would be consistent with *Duffy* judgment which endorsed the views of Werden that,

> *Cartel activity materially differs from other property crimes only with respect to the purpose of sanctions. Rehabilitation and incapacitation are important purposes for most criminal sanctions, but deterrence is the only significant function of sanctions for cartel*

[61] *DPP v Aston Carpets,* para. 21.
[62] Gorecki (2017a, Table 5, p. 31).
[63] Of course, if the individual concerned were in some sense a 'rogue' employee then this would not apply. However, in the remarks of counsel for Aston Carpets at the CCC no such allegations are made.
[64] See, for example, Werden (2009).
[65] *Duffy* judgment at para. 67 states, "*I say once more that if the first generation of carteliers have escaped prison the second and present generation almost certainly will not*." The expectation that gaol sentences would be imposed in future cartel convictions is certainly how the court interpreted the *Duffy* judgment in sentencing Pat Hegarty on 4 May 2012 in the heating oil case. See *DPP v Pat Hegarty*, p. 14.

activity, and the specific deterrence of convicted offenders clearly is secondary to the general deterrence of potential offenders.[66]

However, the Court of Appeal does not discuss general vs. specific deterrence, nor whether gaol is an appropriate sentence for an individual convicted of breaching competition law.

f. Estimating Cartel Profits/Fines: Is €31,000/€45,000 a Credible Estimate?

The Court's €31,000 estimate of the cartel induced profits and a fine of €45,000 are based on patently improbable assumptions. A more appropriate estimate of the cartel induced profits is €22,000, while a fine that would "*punitive and acts as a deterrent*" would be €245,000 or 5.4 times the actual fine imposed by the Court.

The Court of Appeal relies on the operating profit as an estimate of the additional profit gained by participating in a cartel. The value of the eight contracts that Aston Carpets won under the bid-rigging cartel was €556,000, the operating profit, €31,000.[67] However, the operating profit overestimates the cartel induced additional profits. If Aston Carpets and Carpet Centre had competed rather than colluded via bid-rigging then it is likely that the winner of the eight contracts would still have earned an operating profit, albeit not as large. In other words, one cannot assume, as the Court implicitly has, that absent the bid-rigging cartel the operating profit of the firm awarded these eight contracts would have been zero.

This raises the obvious question of what would be a suitable counterfactual. In other words, if there was competition rather than collusion, what would be the margin earned by the business awarded the contract. In the evidence given before the CCC, Aston Carpets operating profit margin on the eight contracts was 4.39 per cent; on the remainder of its business where there was no collusion, 1.3 per cent.[68] The difference in the operating profit margin – 4.39-1.3=3.1 - may be considered an indication of the magnitude of the cartel induced profits.[69] If this is the case the increase in operating profits for Aston Carpets that can be ascribed to the cartel for the eight contracts is €22,000 not €31,000.[70]

However, in setting the appropriate fine that Aston Carpets should pay attention needs to be paid to more than just the benefit to the cartelists. The cost to the consumer of a cartel consists of two

[66] *Duffy* judgment, para. 37. Werden presented a paper (which was later published as Werden (2009)), at a conference sponsored by the CCPC, "Sanctions, Fines and Settlements in Cartel Cases: Developments and Deterrence in the EU and Ireland," held in November 2008 in Dublin at which members of the judiciary attended.

[67] *DPP v Aston Carpets,* SH, p. 19, 32. The Court of Appeal cites a figure of €758,221.42 (*DPP v Aston Carpets*, para. 5), which is inconsistent with the figure cited in the Central Criminal Court. It is not clear on what basis the Court cites the higher figure.

[68] *DPP v Aston Carpets,* SH, p. 32.

[69] This makes certain strong assumptions such as like is being compared with like in terms of commercial flooring contracts, save for the fact that for the fact that one set of contracts were subject to bid rigging. This may not be the case. For example, the contracts subject to bid-rigging may be larger with fewer competitors and hence inherently less competitive compared to contracts not subject to bid-rigging where there may be more competitive as there are more firms competing for business.

[70] I.e. ((4.39-1.3)/4.39). €31,277=€22,015. It should be noted that the operating profit margin on the eight contracts in aggregate is 5.61 per cent not 4.39 per cent (i.e. 31,277/557,460=5.61). The difference may reflect the fact one average is a simple average while the other is weighted.

components as compared to a situation where prices are set by competitive forces. First, the increase in price for those consumers that continue to buy the product or service. This corresponds to the rise in profits due to the cartelist. It is a transfer from consumers to producers. Second, the forgone benefits to consumers who are unable to purchase the good or service at the new higher cartel induced price. By confining its attention only to the first component the Court understates the damage done to consumers by the cartel.

This can be illustrated by Figure 1. Where output and prices are set by competition quantity is C and price is P. If, however, the market outcome is determined collectively through a cartel that manages to realize a monopoly outcome, then price increases to P' and quantity declines to C.' The loss to consumers consists of the increase in price to consumers that continue to purchase the product or service (area 'a' in Figure 1), and the loss to those consumers that cannot afford to pay the higher price (area 'b' in Figure 1).

In the US which like the Ireland criminalizes cartels and sanctions both undertakings and individuals, sentencing in cartel cases reflects both of the components identified above. In the US Sentencing Guidelines, for example, the following explanatory note appears;

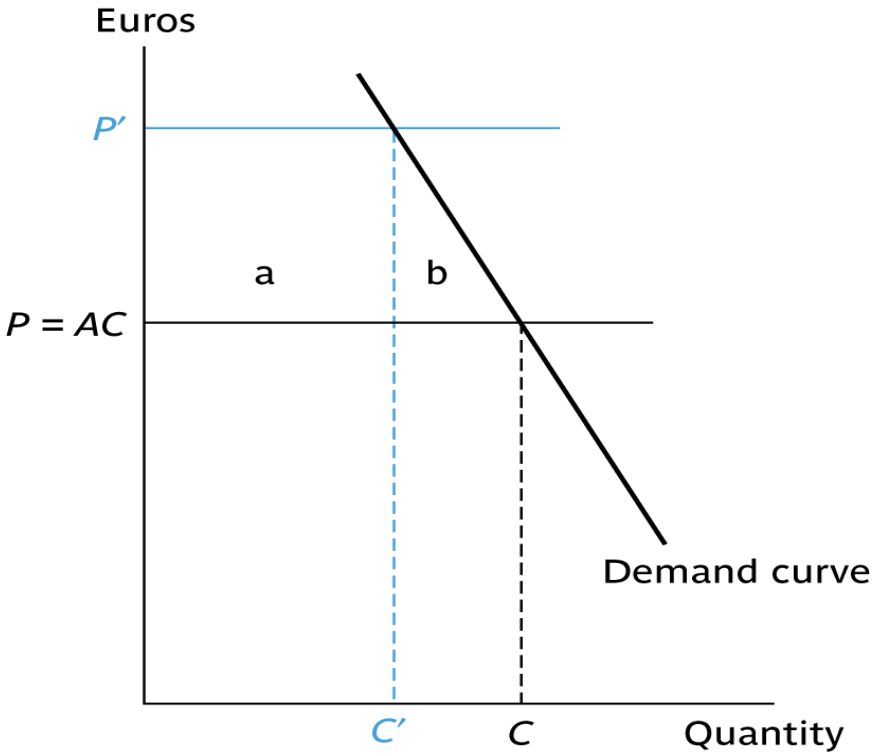
> *In selecting a fine for an organization within the guideline fine range, the court should consider both the gain to the organization from the offense and the loss caused by the organization. It is estimated that the average gain from price-fixing is 10 percent of the selling price. The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under §8C2.4(a)(3). The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss.*[71]

Such an approach is consistent with the consumer welfare object of competition law in Ireland set out above and with the approach in the European Commission (2006) sentencing guidelines.

Irrespective of whether or not the Court pays attention to only one of both components, there remains the issue of how the Court should take into account the fact that not all cartels are detected and successfully prosecuted. As we shall see taking this into account leads to a fine that is a multiple of the illicit gain/cost to the consumer. In the instance case of the Court uses a factor of 1.5 (i.e. €45,000/€31,000=1.5). There is no discussion of the origin of this factor in the Court's judgment, except the remark that "*a fine should be greater than the financial gain so that it satisfies the requirement that it is punitive and acts as a deterrent*."[72] While this is undoubtedly correct, it does not resolve the issue of how much greater.

[71] United States Sentencing Commission (2011, p. 312).
[72] *DPP v Aston Carpets*, para. 23.

Figure 1: The Impact of a Cartel on Consumers



Source: author.

Following the methodology of the Court the fine or cost should greater than the gain to the cartelists. This serves as a general deterrent to potential cartelist. It reflects a view that the cartel members trade off the benefits of participating in the cartel in terms of higher profits, π_m, (and the quiet life of a less competitive world) against the fines imposed by the court, F. However, the probability of detection by a competition agency (P_d) and the probability of successful conviction (P_v) also need to be taken into account. Thus F must be set such that,

$$\pi_m < p_d.p_v.F,$$

where both p_d and p_v fall between 0 and 1. This expression can be rearranged as:

$$F > \pi_m / (p_d.p_v).$$

In the instance case since the Court has determined π_m is €31,000 and F is €45,000 then this implies that $p_d.p_v$ is equal to 0.66. Is this a reasonable estimate?

There have been seven criminal prosecutions since 2000 in Ireland for horizontal agreements between competitors.[73] The prosecution has been successful in obtaining a conviction in five cases,[74] implying that $p_v = 0.71$.[75] Estimating p_d is more difficult since it requires an estimate of the number of cartels, which since such activity is typically secret cannot be readily observed. Nevertheless, for the European Union, Combe, Monnier & Legal (2008) estimate p_d as 0.13.[76] However, this is an annual estimate conditional on the cartel being detected eventually and hence is likely to be an underestimate of p_d. Notwithstanding this limitation and others,[77] if we accept this estimate, this implies that $p_v.p_d$ is equal to 0.09.[78] Despite the limitations attached to this estimate it suggests that the Court's use of 0.66 is far too high resulting in a fine that is too low.

But what should the fine be such that it is punitive and acts as a deterrent? Applying the formula for F and assuming that the cartel induced additional profit is €22,000, implies a fine of €245,000.[79] If the Court's estimate of the additional profits of €31,000 is accepted then the implied fine is €348,000.[80] Hence the Court fine of €45,000 should be increased by a factor of between 5.4 and 7.7.[81]

An alternative method of estimating the fine that should be imposed on the undertaking which reflects the cartel induced gain in profits as well as the loss consumers suffer because they can no longer purchase the product or service at the higher price is to use the EU and/or US sentencing guidelines for cartels. If these guidelines are applied to the commercial flooring bid-rigging cartel then this implies that fine should be either €224,540 (EU guidelines) or between €155,680 and €311,360 (US sentencing guidelines).[82]

Hence using the preferred estimate for the cartel induced profits of €22,000 provides an estimate - €245,000 - that is consistent with the EU and US sentencing guideline estimates for cartels.

[73] Andrews, Gorecki & McFadden (2015, Table 2.3, p. 77) list eight cases where there were criminal prosecutions between 2000 and 2015. However, Estuary case concerned resale price maintenance not a cartel offence. Subsequently only one criminal cartel case has been prosecuted, the commercial floor bid-rigging case.
[74] Successful is defined as one of more of those charged is convicted. The two exceptions are Mayo Waste and Irish Rail.
[75] i.e., 5/7=0.71.
[76] The comparable probabilities for the US were 0.13 to 0.17. (Combe, Monnier & Legal, 2008).
[77] See Hviid & Stephan (2009, pp.139-140).
[78] i.e., 0.71.0.13=0.09
[79] i.e., €22,015/0.09=€244,611.
[80] i.e., €31,277/0.09=€347,522.
[81] i.e., €244,611/€45,000=5.4; €347,522/€45,000=7.7.
[82] For details see Gorecki (2018a, Table 5, p. 31).

V Implications

a. Sentencing Guidance & the Court of Appeal

The Court of Appeal was established on 28 October 2014. On the eve of its establishment, Tom O'Malley, a leading legal scholar, offered a goodwill message to the Court. O'Malley stressed the importance of "*delivering guideline judgments as this is probably the best way of bringing coherence and consistency of approach to sentencing generally*."[83] Such cases are "*likely to be few and far between*."[84] O'Malley (2014, p. 4) considered that in such instances the Court "*should give advance notice to the parties,*" which "*will allow counsel for both sides to make broader submissions than might be necessary or appropriate if the appeal were confined to the facts of a particular case*." O'Malley (2014, p. 5) argued that the need for such "*sentencing guidance cannot be gainsaid.*"

O'Malley's views are consistent with the case made for a Court of Appeal by Susan Denham, the former Chief Justice of the Supreme Court. Denham (2006, p. 13) argued that an

> … *important advantage of a permanent Court of Appeal would be consistency. A permanent Court of Appeal dealing with appeals from criminal courts would obviously develop a jurisprudence in its work - which would include sentencing. Thus it would assist the consistency of sentencing, both actual and the perception thereof.*

Similar sentiments were expressed by the working group set up to consider the creation of a Court of Appeal.[85]

The Court had in some cases prior to commercial flooring bid-rigging case provided sentencing guidance. In particular, in a series of five judgments released on 26 April 2018 involving burglary and robbery the Court elaborated the factors to be taken into account in sentencing for such crimes.[86]

There are sound reasons for arguing that the instant case is one in which sentencing guidance was merited. Hard core criminal cartel cases are few and far between in Ireland. There have been only four successful cartel prosecutions by way of indictment since 2000 including the commercial flooring bid-rigging cartel.[87] The commercial flooring bid-rigging case raised a number of important issues concerning sentencing in cartel cases, several of which were identified by the DPP in the grounds for appeal recited earlier.

b. Future Cartel Enforcement

Nevertheless, the Court decided not to issue sentencing guidance. Major arguments made by the DPP that need to be clarified were completely ignored by the Court with no explanation offered. This does not mean, of course, that the Court's judgment does not have implications for cartel and competition

[83] O'Malley (2014, p. 4).
[84] O'Malley (2014, p. 4).
[85] Working Group on a Court of Appeal (2009, pp. 71-72).
[86] See, for example, *DPP v Casey & anor*. [2018] IECA 21. For a comment see Gallagher (2018).
[87] These were: heating oil; Irish Ford Dealers; and, Citroen Dealers Association. See Andrews, Gorecki & McFadden (2015, Table 2.3, p. 77).

law enforcement in Ireland. Indeed, there can be little doubt that the Court of Appeal judgment in the commercial flooring bid-rigging case is a major setback for cartel enforcement in Ireland. Gaol appears to be off the agenda for bid-rigging and possibly other types of hard core cartels. Fines based on the cartel induced price rise are not only seriously underestimated but imposed on the wrong target. Ignorance as a defence appears to have been revived. Victims are blamed. Bid-rigging cartels appear to be unjustifiably of lesser importance than other types of cartels.

Given the time effort and resources that are required to prepare and prosecute a cartel case such a result is likely to lead to a questioning by the CCPC of whether or not resources should be devoted to cartel enforcement, hitherto a top priority of the agency. The lack of a gaol sentence is likely to reduce the effectiveness of the Cartel Immunity Programme as a method of detecting cartels. Why seek leniency when the only penalty – even after a successful appeal by the DPP on grounds of undue leniency - for an individual is, arguably, a low fine?[88]

The disregard of the seriousness of the bid-rigging cartels undermines the CCPC's aim of pursuing bid-rigging cartels. When the CCPC 2015 *Annual Report* was released in 2016 the Chairperson of the CCPC stated that,

> *In 2016, an ongoing priority for the CCPC is public procurement. Our experience in investigating cartels shows that one of the most common forms of cartel concerns bid rigging. The rate of the overcharge related to detected cartels worldwide is estimated to be between 20-30%, meaning that if only 5% of procurement processes were subject to bid rigging, the extra cost to the lrish taxpayer would be in the region of €100m per year. To both detect and deter bid rigging, the CCPC is exploring the introduction of a screening programme for procurement processes which systematically searches for indications that bid-rigging may have occurred.*[89]

Based on the precedent of the commercial flooring bid-rigging case if two of the major suppliers of a particular good or service purchased by the public sector meet every few weeks to agree cover bids then this is not really a cartel according to the Court and furthermore the public sector by way of exercising some element of independent judgment could have prevented the cartel from having an impact.

c. What Can Be Done?

Nevertheless, notwithstanding these somewhat gloomy implications of the Court's judgment there are ways in which the impact might be ameliorated perhaps even reversed. The CCPC, in conjunction with, for example, the DPP, could hold a seminar(s) similar to that held by the Competition Authority on 22

[88] Brendan Smith was reported to have had a monthly income of €9,422 (Gorecki, 2017a, p. 13) and assets of several €100,000 (*DPP v Aston Carpets*, S, p. 7).

[89] CCPC (2016). A similar statement was made in the Chairpersons 'Introduction' to the CCPC's 2016 *Annual Report*: "*Cartels are, and will continue to be, one of the CCPC's main enforcement priorities. These are serious crimes and anyone convicted is liable to either imprisonment or a substantial fine or both. Bid rigging, in particular, distorts the competitive tender process, potentially excluding legitimate competitors resulting in artificially high price bids*" CCPC (2017, p.3). See also the 2017 *Annual Report*, CCPC (2018, p. 3).

November 2008, 'Sanctions, Fines and Settlements in Cartel Cases: Developments and Deterrence in the EU and Ireland.' Leading members of the judiciary, the competition bar and economists/lawyers from the Netherlands, the UK and the US chaired sessions and made presentations. The conference influenced the language and approach of Justice McKechnie in the *Duffy* judgment in which he quoted from the paper presented by Werden (2009).

The DPP should be much more forthright in arguing what the appropriate sanction for both individuals and undertakings in cartel cases together with the methodology, especially given the reluctance of the Court to opine on these issues in any meaningful manner.[90] At the moment there seem to be some conventions that limit the role of the DPP in this respect. The DPP (2014, para. 4), for example, in its *Guide to Prosecutors* states that, "*unless the Court of Criminal Appeal or the Court of Appeal has itself given guidance on the range or band of sentencing for particular offences or classes of offences, it is not appropriate for the prosecutor to submit to the sentencing court bands or ranges of sentencing*" (para 8.14). Nevertheless, O'Malley (2014) seems to think that maybe there is a little more wriggle room in this respect.

Either way we are in a somewhat anomalous situation. The DPP can appeal a sentence on the grounds of undue leniency, but is not allowed to set out what might be an appropriate sentence together with the corresponding methodology. The dots cannot be joined together. There appears to be a concern that in doing so the DPP infringes on the court's discretion. In the 2012 sentencing of Pat Hegarty, for example, when the solicitor for the Competition Authority drew attention to the fact that the judge had previously stated that some members of the heating oil cartel were minnows, the judge said, "*I'm not comfortable with a commentary from the witness on the sentencing policy of the Court*."[91]

Yet it is difficult to see how providing more information about the approach that might be used in setting the sanction should detract from the discretion or authority of the court in determining the sanction. At the time of writing much attention was paid to the US Government's Sentencing Memorandum in the case against George Papadopoulos prepared by Robert Mueller III, Special Counsel, requesting gaol for up to six months and a fine of $9,500.[92] The Antitrust Division of the US Department of Justice routinely releases its sentencing memorandum. Is the discretion of US judges fettered by these representations? Can US judges exercise independent judgment? Presumably the answer is no and yes respectively, so why should judges in Ireland be different?

Nevertheless, despite these propitious conditions the Court does not appear to have sought guidance from the DPP and/or the legal representatives of Aston Carpets and Brendan Smith that might lead to

[90] Judging by the CCC transcripts on sentencing the DPP largely referred the judge to the *Duffy* judgment. However, it should be remembered that the CCC (and the Court) consisted of judges will rarely if at all have dealt with cartel cases. Hence some thought might also be given to providing the judge with some background on competition law, what a cartel is, why they damage consumers, the way in which sanctions might be structured and so on.

[91] *DPP v Pat Hegarty*, p. 8. See footnote 10 for source.

[92] On 7 September 2018 George Papadopoulos was sentenced to serve 14 days in gaol, pay a fine of $9,500 and serve 200 hours of community service. For details see: https://www.justice.gov/sco.

the development of sentencing guidance or a sentencing methodology in cartel cases. Furthermore the DPP did not suggest a range of possible sentences consistent with previous cases or a methodology for sentencing.[93]

d. European Union Dimension

The focus of the paper has been an evaluation of the commercial flooring bid-rigging cartel from an economic and legal perspective. As noted above Irish competition law and its enforcement sit firmly within the wider European Union context. With its single market imperative European competition policy strives to achieve a consistent and robust enforcement of competition law across Member States, with a consequent convergence in approach toward enforcement. One of the most recent manifestations of this trend is the introduction of measures by the European Commission to make national competition authorities more effective enforcers of competition law.[94] The treatment by the Central Criminal Court and the Court of Appeal of the commercial flooring bid-rigging case leans against the movement towards greater consistency and convergence across Member States in competition enforcement. The view that a bid-rigging cartel is somehow of lesser importance than a cartel characterized by price fixing as in the CDA cartel case flies in the face of EU competition law, while the fine imposed on Aston Carpets is out of line with the fining guidelines of the European Commission. Instead of a fine of a €10,000, a sum closer to €224,540 would be deemed appropriate. It is to be hoped that next time the courts in Ireland deal with a cartel case greater attention is paid to the European precedents and methodology in characterizing a cartel and in setting fines, while referencing US sentencing guidance for individuals.

[93] O'Malley (2014, pp. 5-9) discusses the prosecutors role. See also DPP (2016).
[94] For details see: http://ec.europa.eu/competition/antitrust/nca.html.

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